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ABSTRACT

This review of the history of the coverage principle developed by the Federal Communications Commission (FCC) concludes that government regulation of mass media program content can be dangerous and that the coverage principle needs to be abolished. The first section of the report discusses the FCC's interpretation of the 1934 Communications Act from 1949 to 1959, the second section describes the FCC's shift in policy in the early 1960s concerning public issues programing, the third section presents the FCC's reassertion of the coverage principle during the period from 1969 to 1973, the fourth section explains the development of a new policy based on the 1974 Fairness Report, and the last section of the review outlines the Commission's policy as of 1979. An analysis of applications of the doctrine is presented to support the theory that broadcast licensees believe they would take a greater risk in airing controversial programing than if they did not. (AEA)

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THE FCC, THE COVERAGE PRINCIPLE OF THE FAIRNESS DOCTRINE AND THE FIRST AMENDMENT

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THE FCC, THE COVERAGE PRINCIPLE OF THE FAIRNESS DOCTRINE

AND THE FIRST AMENDMENT

The U.S. Supreme Court frequently has said that the purpose of the First Amendment is to foster an open and vigorous debate of public issues.[1] In the case of the broadcast media, the Court has said that the government could adopt regulations to protect the right of the public "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."[2] In two major opinions, the Court has accepted a Federal Communications Commission policy now known as the fairness doctrine as an appropriate vehicle to keep the public adequately informed.[3]

This policy, which originated in a 1949 document, Editorializing by Broadcast Licensees,[4] declares that broadcast licensees have a responsibility to devote a reasonable amount of broadcast time to the discussion of public issues and to allow opportunities for opposing viewpoints on those issues.[5] In both Red Lion Broadcasting Co. v. FCC and Columbia Broadcasting System, Inc. v. Democratic National Committee, the Court relied on the word of the FCC that licensees were required to provide adequate coverage of public issues as well as being required to be fair.[6] In Red Lion, the Court particularly emphasized that it was important that the responsibility to be fair did not limit coverage of controversial issues in the first place.[7]

However, the FCC apparently did not tell the Court that it had not generally enforced the responsibility to provide issue-oriented programming.[8] In fact, the FCC had not established a regulatory procedure to ensure that licensees provided sufficient amounts of public issues programming.[9] Furthermore, since CBS v. DNC, the FCC has interpreted the language in the Report on

Editorializing so that licensees are not required--even theoretically--to provide a reasonable amount of public issues programming in general. Instead, they only have to provide programming for a very few issues "critical" to the communities they serve.[10]

The FCC's failure to enforce what can be called the coverage principle of the fairness doctrine, along with its reinterpretation of that responsibility, has undermined the Commission's supposed policy of encouraging debate of important public controversies. There is, in effect, no regulatory encouragement for licensees to provide discussion of controversial public issues generally. This is particularly significant since the Supreme Court based two major decisions involving programming regulation on the assumption that the two principles of the fairness doctrine, together, provided adequate protection for First Amendment values.

The history of the coverage principle mentioned in the Report on Editorializing is a story of administrative neglect, bureaucratic accidents and ad hoc policy-making. These errors were compounded because policy changes were not discussed publicly, and sometimes not even announced publicly. Sometimes, the Commission itself did not seem to understand its own policy.

The Beginning: 1949-1959

The language in the Report on Editorializing stressing the importance of public issues programming was a product of the FCC's longtime concern that such programming might be neglected. Several times during the 1940s the Commission emphasized that licensees had a responsibility to provide programming on controversial issues.[11]

The proceedings that led to the Report on Editorializing were initiated because of broadcast industry dissatisfaction with another FCC programming policy.[12] A 1941 FCC opinion, Mayflower Broadcasting Corp.,[13] had been

interpreted as a ban on editorializing by broadcast licensees. In 1947, the FCC announced that it would re-examine that policy.[14]

The subsequent report, adopted 4-1, allowed licensee editorials. But the document stressed the obligations of broadcast licensees in a democracy. Licensees, as trustees of the public, had to operate their stations as vehicles "of freedom of speech and freedom of expression for the People of the Nation as a whole."[15] The report asserted that a portion of the radio spectrum had been allocated to radio broadcasting because of the contribution the medium could make toward informing the public. Hence, the Commission said, the regulatory standard of service in the public interest, convenience, or necessity announced in the 1934 Communications Act "must be interpreted" with regard to the informational role of broadcasting. Consequently, licensees had to provide "a reasonable percentage" of their broadcast time for news and programs "devoted to the consideration and discussion of public issues of interest in the community served by the particular station." Also, licensees had to present "the different attitudes and viewpoints concerning these vital and often controversial issues."[16] Nowhere in the report did the Commission use the term "fairness doctrine."

The FCC did not explain the announced duties very thoroughly. The word "reasonable" was the only term used to suggest how much of a commitment might be required of licensees. The FCC seemed to distinguish between "public issues" and "controversial issues,"[17] but did not define either term.

The report did not announce any specific enforcement mechanisms. The Commission had not adopted a rule or regulation that required broadcasters to live up to the standards enunciated or automatically face particular penalties. Instead, the FCC had only explained its interpretation of a licensee's responsibility under the 1934 Communications Act. Any enforcement must take place during the FCC's triennial review of each station's performance in light of

the public interest standard.[18]

As a matter of fact, in the first 10 years after the Report on Editorializing was adopted, there was very little enforcement, particularly of the responsibility of licensees to carry issue-oriented programming. No station had lost its license because it failed to provide such programming. No licensee had faced a public hearing on the matter.[19] An official for one station had even told the FCC that broadcasts of discussions of controversial issues, political matters, pending legislation and international relations were to be avoided.[20] That station had not initiated such programming, and yet it was not directly penalized.[21]

Changes in Approach: Early 1960s

During the early 1960s, the FCC announced two significant shifts in policy affecting public issues programming. However, the implications of the changes for the coverage principle of the Report on Editorializing would not be apparent for a decade.

The FCC inaugurated the first of the two policy changes in the Report and Statement of Policy re: Commission en banc Programming Inquiry.[22] Prepared quickly in the wake of the quiz show and disc jockey payola scandals, the 1960 Programming Policy Report suggested a new approach to the regulation of public issues programming. Although the report did not denounce, or even mention directly, the coverage principle of the Report on Editorializing, the new document said that a licensee's primary obligation was a "diligent, positive and continuing effort. . . to discover and fulfill the tastes, needs and desires of his service area."[23] Each licensee, rather than relying on the Commission for an explanation of his public interest responsibilities, was supposed to look for guidance from the people of his community.

Once again, the Commission did not define the key terms, such as "needs"

and "interests."[24] However, it did list "major elements usually necessary to meet the public interest, needs and desires of the community," including public affairs programs,[25] news programs, political broadcasts, editorials and opportunities for local self-expression.[26]

The second significant policy change was a revision of the Commission's approach toward allegations of unfairness, the second principle announced in the Report on Editorializing. Up to that time, fairness complaints had been evaluated only as one aspect of a licensee's performance during the review of his application for renewal every three years. By 1962, however, the Commission had begun to settle fairness complaints as they arose--apart from the license renewal process.[27] The new approach applied only to what was then referred to as the "fairness doctrine," and it is evident that this term did not apply at the time to the responsibility to provide public issues programming in the first place.[28] The term "fairness doctrine," as it was understood then by the FCC, applied only to a licensee's obligation to be fair in the presentation of controversial issues.

Neither of the two policy changes seemed to alter the Commission's enforcement of public issues programming during the 1960s. There is no evidence that the FCC paid much attention to the amount of issue-oriented programming the stations were providing,[29] or even to whether a station's programming was meeting the needs of the community.[30] No licenses were taken away for a violation of either principle. No licensee's application was the object of a hearing on either basis. In fact, two FCC commissioners, Kenneth Cox and Nicholas Johnson, often protested the lack of attention being given to licensee programming records.[31] They often revealed the call letters of stations devoting less than one per cent of their air time to public affairs or less than five per cent to a combination of categories, including public affairs.

Reincarnation of the Coverage Principle: 1969-1973

Cox and Johnson lacked the power to change FCC policy regarding public issues programming, but the Supreme Court did not. In the 1969 Red Lion opinion, the Court emphasized the importance of controversial issue programming, and indicated that licensees had a constitutional obligation to provide it.

In the case involving the Red Lion Broadcasting Co.,[32] the FCC was attempting to defend the fairness doctrine against charges that it was unconstitutional and exceeded the authority Congress had granted to the FCC. The Commission argued that the fairness doctrine, which was described as only requiring licensees to present opposing views on public issues, enhanced rather than suppressed free expression. The purpose of the fairness doctrine, the FCC argued, was to ensure one viewpoint did not monopolize the air waves. The Commission referred to the two-fold obligation announced in the Report on Editorializing, but did not dwell on the duty of licensees to program public issues discussions.[33]

Justice Byron White, however, opened his majority opinion by asserting that the FCC

> has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine. . . .[34]

White asserted that it was the constitutional right of viewers and listeners to be informed.[35] He later said the chances that licensees would avoid controversial issues because of the requirement to be fair were "at best speculative."[36] However, White added that

> if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.[37]

White said the FCC would not be violating the constitution if it insisted that stations provide adequate coverage of public issues.[38]

Shortly after the Red Lion opinion, the FCC began to respond--if only in words. The Commission began to emphasize in policy statements and opinions, as it had not before 1969, the responsibility of licensees to provide public issues programming.[39] Sometimes the FCC considered the duty to be part of the fairness doctrine and sometimes it did not.[40]

In one opinion, in particular, the FCC used language that would become particularly significant a few years later. The opinion was prepared by the FCC's Complaints and Compliance Division, the agency that evaluates fairness doctrine complaints. The division had received a letter from the Friends of the Earth environmental group, which asked that the Commission require "counter-commercials" in response to automobile and gasoline television advertising. The FCC refused, but said that licensees had to live up to their public trust by informing viewers and listeners on issues as important as air pollution. The Commission stressed that a large amount of discretion was given to each licensee, but said that

> it would be no more reasonable for broadcasting to ignore these burning issues of the seventies--which may determine the quality of life for decades or centuries to come--than it would be to ignore the issue of Vietnam or the issue of racial unrest in communities racked by this problem.[41]

In Friends of the Earth, an opinion written by the FCC agency that evaluated complaints as they were received, the Commission said that the duty to provide a reasonable amount of time for issue-oriented programming was not reviewable apart from the renewal process. At that time, a station's overall programming record could be considered.[42] Hence, the Complaints and Compliance Division did not seem to have a role in determining whether a licensee had fulfilled his coverage responsibility under the Report on Editorializing.

However, during the license renewal process, handled by the Renewal and

Transfer Division of the FCC, the Commission made it quite clear that it would not consider the percentage of public affairs programming a station provided as a criterion for judging licensee performance.[43] Rather, the FCC said, the standard was whether a station had provided programming that met the community needs.[44] The Commission did not specify how many problems should be treated through programming or how much time had to be devoted to the effort.[45] The Commission did schedule a hearing for one station which may not have provided news programming on a significant community problem.[46] The opinion did not appear to mention the responsibility to provide a reasonable amount of public issues programming.

A New Policy Develops: 1974-Present

In 1974, the FCC published its first major document on the fairness doctrine in a decade.[47] This one, called the Fairness Report,[48] emphasized the importance of the coverage principle of the Report on Editorializing more than any previous Commission policy statement. In the Fairness Report, the FCC clearly stated that the fairness doctrine involved two responsibilities:

> 1) the broadcaster must devote a reasonable percentage of his broadcast time to the coverage of public issues; and 2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view.[49]

The Commission said the first duty was the more basic of the two.

In the Fairness Report, the FCC restated its opinion that a large share of the electromagnetic spectrum had been allocated to broadcasting because of its potential for informing the public.[50] The Commission said it would not allow "this purpose to be frustrated by broadcasters who consistently ignore their public interest responsibilities." The fairness doctrine--"including the affirmative obligation to provide coverage of issues of public importance"--was the single most important requirement of broadcasting in the public interest, the report said.[51]

However, the Fairness Report left many questions unanswered. The report did not say whether the FCC planned to enforce the coverage responsibility as part of the fairness doctrine through the Complaints and Compliance Division, or only as part of the renewal process through the Renewal and Transfer Division. It did not outline what viewers or listeners should include in a well-drafted complaint regarding this responsibility, although it did so for allegations of unfairness.[52] The Commission once again did not explain the term "public issues."[53] It also did not explain what constituted a "reasonable" amount of time. The Fairness Report indicated only that each licensee must determine "what percentage of the limited broadcast day" to devote to public issues.[54]

In fact, the Fairness Report added a complication. For the first time, the Commission seemed to suggest that the fairness doctrine included an obligation for licensees to provide programming on particular issues. Although the FCC went out of its way to emphasize licensee discretion, the Fairness Report reminded readers that, in the past, the FCC had

> indicated that some issues are so critical or of such great importance that it would be unreasonable for a licensee to ignore them completely.[55]

The report referred to the Friends of the Earth opinion. The Commission did not explain what kinds of issues might be involved. It did not indicate how such a responsibility might be enforced. In fact, the FCC said that it rarely made such statements and had no intention of becoming involved in the selection of issues discussed.[56]

Regardless of the disclaimers, the FCC had at least mentioned a duty to provide programming on particular issues in a report focused on the fairness doctrine. This seemed to be a responsibility above and beyond the duty of providing a reasonable amount of time for public issues, but the FCC had not made that clear. In fact, what soon became apparent was that the FCC still did

not have a well-developed policy based on the coverage principle of the Report on Editorializing.

The first opportunity for the FCC to explain the relevant portion of the Fairness Report came less than six months later. The FCC's Complaints and Compliance Division rejected an allegation that Los Angeles television stations had violated the fairness doctrine by failing to provide programming about license renewal legislation. The Commission said it did not consider license renewal legislation to be in "that very limited class of issues" where the licensee cannot choose other issues in its place.[57] "The first obligation of the fairness doctrine," the FCC explained,

> to devote a reasonable amount of time to programming on controversial issues of public importance, imposes a general obligation on licensees to carry such programming.[58]

The Commission said the first portion of the fairness doctrine, the coverage principle, had only "a very limited application to the programming of specific issues."[59]

Only a year later, however, the FCC contradicted itself. The Commission told another petitioner that the coverage principle applied only when specific issues had been neglected. This time the Commission's Renewal and Transfer Division was considering a petition to deny the renewal of the license of a San Francisco television station. The FCC said it would review a licensee's performance when presented with evidence that he had failed to cover "specific issues of local importance" or had been unfair in that coverage. "Conclusionary allegations" that the station had not devoted enough time to "problem-oriented news" or "informational programming" were not sufficient.[60]

This direct contradiction was not cleared up in a reconsideration of the Fairness Report.[61] The Reconsideration did state officially, for the first time, that the Commission would consider complaints relative to the coverage principle of the fairness doctrine as they arose.[62] The Reconsideration also

made it apparent that the FCC was no longer distinguishing between "public issues" and "controversial issues of public importance," as it had in the Report on Editorializing.[63]

Finally, in 1976, the FCC reprimanded a licensee for not fulfilling his responsibilities under the coverage principle of the fairness doctrine. The Commission's Complaints and Compliance Division asserted that a radio station in Clarksburg, W. Va., had not shown that it aired programming about strip-mining when that issue was being considered by Congress.[64] The FCC said a station's failure to cover an issue as important to a community as strip-mining was to Clarksburg raised the question of whether the station was acting responsibly.[65] The licensee was given 20 days to explain how he would meet his fairness doctrine obligation.[66]

The FCC's Complaints and Compliance Division has since rejected a few other allegations that licensees had not provided programming on important community issues.[67] However, in recent license renewal proceedings, the coverage principle was still being defined in different ways. In 1978, the Renewal and Transfer Division once referred to a licensee's fairness doctrine obligation to provide programming on "burning issues of local importance."[68] During the same year, an administrative law judge adjudicating a license challenge, indicated the fairness doctrine issue in the case involved whether the licensee had "devoted a reasonable amount of time to the discussion of conflicting views on controversial issues of public importance."[69]

The Policy: 1979

The FCC still claims officially that the fairness doctrine requires licensees 1) to devote a reasonable percentage of their broadcast time to the discussion of issues of public importance and 2) to do so fairly by providing a reasonable opportunity for the presentation of conflicting points of view on

those issues.[70] This is substantially the language used in the Report on Editorializing, where the policy was originally announced. However, although the Commission still bases its policy on that report, it is not interpreting its language in the same way it did in 1949.

In spite of the confusion still in evidence, two generalizations seem appropriate. First, the Renewal and Transfer Division has demonstrated that it will not enforce a licensee responsibility to devote a reasonable amount of time to the airing of public issues--or even public affairs--in general.[71] Secondly, the Complaints and Compliance Division has interpreted the coverage principle mentioned in the Report on Editorializing to require that licensees provide programming on only a very few issues "critical" to their communities.[72]

When the FCC, in its Report on Editorializing, said that licensees had a responsibility to provide a reasonable amount of public issues programming, the Commission was talking in general terms. The Commissioners thought each licensee should provide some discussion of public issues during his overall programming effort. The FCC did not suggest some issues were more important than others, or that the policy would be based on the programming aired on a few select subjects. Yet, this is exactly how the language is being interpreted in 1979.

Analysis

The FCC's approach to the fairness doctrine's coverage principle almost certainly has damaged First Amendment interests.

First, and probably the most important, the FCC's administration of the overall fairness doctrine cannot have served to encourage the broadcast of public issues programming. The FCC has never initiated enforcement of the coverage principle.[73] Instead, the Commission has relied upon receiving complaints from listeners and viewers. However, the FCC did not announce this

fact until a few years ago and it has never explained the procedure for filing a coverage principle complaint. Not suprisingly, in 30 years, the Commission has not yet received a dozen complaints relating to the coverage principle. The Commission has never penalized a licensee for failure to provide programming about controversial public issues[74] even though many may have provided nothing.[75]

In contrast, licensees were more likely to receive the Commission's attention--and have to devote time and money to defending themselves--if they went to the effort and expense to air programming on a controversial issue. In recent years, the FCC has received 5,000 complaints a year alleging unfairness.[76] The public attention focused on the fairness principle has resulted in FCC preoccupation with fairness and major court opinions over the issues of fairness.[77]

In other words, licensees could not be blamed if they believed they were taking a greater risk by airing controversial programming than if they did not.

Moreover, under the FCC's new interpretation of the coverage principle, licensees are now no longer even under a policy obligation to provide public issues programming generally. The FCC itself has said that the coverage principle applies to far fewer issues than does the requirement that licensees be fair.[78] Hence, most of the programming that may trigger fairness complaints does not have to be aired at all. As long as licensees provide programming directed at the community's "critical" issues, they can safely ignore other public concerns without violating the fairness doctrine. This could lead, of course, to very little overall issue-oriented programming.[79]

Thus, the overall fairness doctrine, more than ever, is unlikely to be encouraging the broadcast of public issues programming--unless the FCC's rhetoric alone provides sufficient motivation. Logically, the fairness doctrine, as administered, would tend to limit the debate on controversial issues. This, of course, is contrary to the purpose of the First Amendment as interpreted by the U.S. Supreme Court.

Furthermore, the coverage principle as interpreted raises another constitutional issue. The FCC has said, in effect, that it is the final word on which public issues must be discussed on the broadcast media. This regulatory approach not only encourages FCC examination of programming content, but may affect what is said over the air. Although the Supreme Court has indicated the government could enlarge and enrich the opportunities to discuss public issues, it has never suggested that government could decide what is to be talked about.[80] The FCC's current interpretation of the coverage principle gives the Commission a potentially powerful political weapon, particularly considering the vague standards that have been enunciated. The risk involved is not eliminated by the FCC's current emphasis on licensee discretion and the Commission's reluctance throughout its history to penalize recalcitrant licensees. The Commission demonstrated in the Clarksburg, W.Va., strip-mining case that it can threaten an individual licensee with very little warning.[81]

Conclusion

The U.S. Supreme Court's approach to the First Amendment--that government can encourage the public debate in the mass media through regulation--may be laudable in theory. However, the FCC has demonstrated that government regulation of program content can, indeed, be dangerous. Through poor planning and neglect, the Commission has insured that an apparently reasonable policy--that licensees provide some public issues programming--has become ineffective and potentially repressive. The policy, indeed, may well have the opposite effect of what was intended. Although such a result is undesirable in any government regulation, it is particularly unwelcome in the sensitive First Amendment area.

The coverage principle of the fairness doctrine needs to be abolished. The FCC has thus far shown no inclination to do so, but Congress may be more willing. Both the House and the Senate have been re-evaluating the 1934

Communications Act and at least some revisions are expected. The coverage principle could be eradicated by an appropriate revision of broadcast programming regulation.[82] Even if Congress does not significantly overhaul the 1934 act, it should at least eliminate major problems in current policy. The coverage principle of the fairness doctrine, as administered by the FCC, should be near the top of the list.

FOOTNOTES

[1]See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-390 (1969); New York Times v. Sullivan, 376 U.S. 254, 270 (1964); Associated Press v. U.S., 326 U.S. 1, 20 (1945).

[2]Red Lion Broadcasting Co. v. FCC, op. cit., p. 390.

[3]Ibid., pp. 375, 389-390, 393-394, 396; Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101-102, 111-113, 128-131 (1973). In Red Lion, the FCC was defending a special aspect of the fairness doctrine that provided that a person verbally attacked during a discussion of a controversial issue had a right to reply time. In CBS v. DNC, the Commission was defending its refusal to require licensees to sell time for the broadcasting of controversial issues.

[4]Hereinafter referred to as Report on Editorializing.

[5]Report on Editorializing, 13 F.C.C. 1249, 1258.

[6]Red Lion Broadcasting Co. v. FCC, op. cit., pp. 369, 377, 393-394; Columbia Broadcasting System, Inc. v. Democratic National Committee, op. cit. 101-102, 111-113, 129-132; Brief for Plaintiff, pp. 21, 23, 53, Columbia Broadcasting System, Inc. v. Democratic National Committee, op. cit.

[7]Red Lion Broadcasting Co. v. FCC, op. cit., p. 393.

[8]See generally Respondent's Brief in Opposition to Certiorari and Brief for Appellee, Red Lion Broadcasting Co. v. FCC, op. cit., and Brief for Plaintiff, Columbia Broadcasting System, Inc. v. Democratic National Committee, op. cit.

[9]Up to the time of the CBS v. DNC decision, the Commission had not indicated it would receive complaints that a licensee was providing an insufficient amount of public issues programming. In addition, the amount of public issues

programming was not being considered as a factor during license renewal procedures. See infra, pp. 6, 8.

[10]Infra, pp. 10, 11-12.

[11]Radio Corp. of America, 10 F.C.C. 212, 214 (1943); United Broadcasting Co., 10 F.C.C. 515, 517 (1945); Johnston Broadcasting Co., 12 F.C.C. 520, 522, 524 (1947); U.S., F.C.C., Public Service Responsibility of Broadcast Licensees, pp. 39-40 (1946) (hereinafter referred to as the Blue Book). The FCC's motivation for the policy was confirmed in interviews in 1976 with two men primarily responsible for writing the Report on Editorializing, Benedict P. Cottone, FCC general counsel at the time (interview, Washington, D.C., Feb. 4, 1976), and Richard Solomon, one of his assistants (interview, Washington, D.C., Jan. 29, 1976).

[12]A more complete history of the report and events leading to it is available in William Chamberlin, "A History of Public Issues Programming Regulation by the Federal Communications Commission: More Rhetoric Than Action," unpublished Ph.D. dissertation, University of Washington, 1977 (hereinafter referred to as Chamberlin, "A History of Public Issues Programming Regulation")

[13]8 F.C.C. 333.

[14]U.S., F.C.C., Order, Editorializing by Broadcast Licensees (Sept. 5, 1947).

[15]Report on Editorializing, op. cit., p. 1248.

[16]Ibid., p. 1249.

[17]Besides the example in the text above, the report also stated that

> The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible (emphasis added) (ibid., p. 1254).

See also ibid., p. 1251.

[18]In a discussion of the enforcement of the fairness principle the report did say that FCC consideration of program service was limited to a determination of whether the licensee's overall programming was serving the public interest. The Commission said that a station's airing, or refusing to air, any particular program "must be considered in the light of its other program activities." Ibid., p. 1255. Cottone, Solomon and Commissioner Rosel H. Hyde (interview, Washington, D.C., Jan. 27, 1976) said in 1976 interviews that the FCC in 1948 did not intend to investigate each complaint generated by the Report on Editorializing as it arose or to evaluate a licensee's performance apart from its overall programming effort. Solomon said the Commission and its staff believed they were limited to establishing a general standard and maybe, during renewal, "moving against people who clearly abused it."

[19]In a February, 1976, interview, Benedict Cottone, FCC general counsel for the first few years of the decade, said no major issue was made of how much public issues programming a station provided. He said that if a licensee was providing little or no such programming, the Commission would accept any explanation.

[20]Morrisville Broadcasting Co., 6 P & F Radio Reg. 77, 87, 88 (1950).

[21]The FCC denied WOAX, Inc., the licensee involved in the Morrisville Broadcasting case, a construction permit. However, the Commission renewed the license of the station involved in 1950. WOAX, Inc., 6 P & F Radio Reg. 1101.

[22]44 F.C.C. 2303 (hereinafter referred to as 1960 Programming Policy Report).

[23]Ibid., pp. 2312, 2314. This is in contrast to the responsibility mentioned in both the Blue Book and the Report on Editorializing--that licensees would have to provide adequate amounts of programming for public issues.

[24]Years later, the Commission said the word "problems" was a synonym for "need and interests." Primer on Ascertainment of Community Problems by Broadcast Applicants, Report and Order, 27 F.C.C. 2d 650, 656-657 (1971) (hereinafter referred to as Primer on Ascertainment).

[25]The term "public affairs" was used in connection with the license renewal process beginning with this document. It eventually was used on license applications. "Public affairs programs" were defined in the 1960s to include "talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national, and international public affairs." U.S., F.C.C., Application for Renewal of Broadcast Station License; Form 303 (1969). The FCC has not explained the relationship between the terms "public affairs" and "public issues" or "controversial public issues."

[26]1960 Programming Policy Report, op. cit., p. 2314.

[27]E.g., Billings Broadcasting Co., 40 F.C.C. 518 (1962). See Letter to Representative Oren Harris, 40 F.C.C. 582 (1963).

[28]E.g., Letter to Representative Oren Harris, op. cit.; Clayton W. Mapoles, 40 F.C.C. 510 (1962); Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964); U.S., F.C.C., 32nd Annual Report; Fiscal Year 1966 (Washington, D.C.: Government Printing Office, 1966), p. 90.

[29]The so-called responsibility to carry public issues programming was very rarely mentioned by the Commission in its majority opinions during the 1960s. The commissioners had no accurate way to determine from license renewal applications how much public issues programming was being provided by licensees. Before 1965, stations were asked to record the amount of "discussion" programs, which included "forum, panel, and round-table programs." After that time, the license renewal applications asked for the amount of time

devoted to "public affairs" programs. However, during the 1960s, even this information was not considered in the FCC staff evaluation of renewal applications. See infra, note 30. Interview with Kenneth Cox, former FCC commissioner, Washington, D.C., Jan. 28, 1976 and interview with Richard J. Shiben, then chief of Renewal and Transfer Division, FCC, Washington, D.C., Jan. 30, 1976. See also infra, note 31.

[30]Supposedly, during the 1960s, license applications were being examined to determine whether a licensee was providing programming to meet the needs of the community and whether he was providing the programming promised in previous applications.

[31]For examples of the Cox and Johnson dissents, see License Renewals in Indiana, Kentucky and Tennessee, 10 P & F Radio Reg. 2d 944 (1967); Renewal of Standard Broadcast Station Licenses, 7 F.C.C. 2d 122 (1967) and Renewal of Standard Broadcast and Television Licenses for Oklahoma, Kansas and Nebraska, 14 F.C.C. 2d 1 (1968).

[32]See Fred W. Friendly, The Good Guys, the Bad Guys and the First Amendment; Free Speech vs. Fairness in Broadcasting (New York: Random House, 1976), chaps. 1, 3, 4. At the Supreme Court level, the case was joined with a challenge of the FCC's formal regulations involving personal attacks and political editorializing. See Radio Television News Directors Association v. U.S., 400 F. 2d 1002 (7th Cir. 1968).

[33]Respondent's Brief in Opposition to Certiorari, pp. 2, 10, and Brief for Appellee, pp. 14, 15, 17, 22, 23, 35, 37, 38, 41, 53, Red Lion Broadcasting Co. v. FCC, op. cit.

[34]Red Lion Broadcasting Co. v. FCC, op. cit., p. 369. White did not appear to distinguish between "public issues" and "controversial issues" in the opinion. Ibid., pp. 369, 377, 385, 393, 394.

[35]Ibid., p. 390.

[36]Ibid., p. 393.

[37]Ibid.

[38]Ibid., p. 394.

[39]E.g., Friends of the Earth, 24 F.C.C. 2d 743, 750-751 (1970) (often referred to in FCC documents as Gary Soucie); Democratic National Committee, 24 F.C.C. 2d 216, 221-225 (1970); U.S., F.C.C., 37th Annual Report; Fiscal Year 1971 (Washington, D.C.: Government Printing Office, 1972), p. 30.

[40]E.g., Friends of the Earth, op. cit. Democratic National Committee, op. cit.; F.C.C., 37th Annual Report, op. cit.; Obligations of Broadcast Licensees Under the Fairness Doctrine, 23 F.C.C. 2d 27, 28 (1970).

[41]Friends of the Earth, op. cit., pp. 750-751.

[42]Ibid., p. 751.

[43]The division had no way to determine the amount of "public issues" programming licensees were providing. Supra, notes 25, 29.

[44]E.g., National Broadcasting Co., 47 F.C.C. 2d 803, 812 (1974); Miami Valley Broadcasting Corp., 48 F.C.C. 2d 177, 186 (1974). The FCC did not explain the relationship between "public issues" or "controversial issues" and "community needs" or "community problems." A few years later, the Commission did suggest there was some difference between the two kinds of terms. See infra, note 53. The Commission has suggested it is referring to different kinds of programming in its use of the terms "issues" and "needs" or "problems." The FCC has referred directly to broadcast content that would treat the need for improved schools, roads, or welfare programs as the kinds of programming it is concerned with during the license renewal process. Primer on Ascertainment, op. cit. pp. 656-657. Licensees tend to provide programming that features nutrition, health care, minority heritage and culture and services available to youth and aged. Chamberlin, "A History of Public Issues Programming Regulation," op. cit., pp. 263-265. Such programming does not

often deal with controversial issues, and often not with national issues. Such programming tends not to provide discussions of issues.

[45]The Commission has said nothing about the amount of time licensees should devote to meeting the needs of their communities. The FCC said that it would investigate when the amount of programming appeared to be "patently insufficient to meet significantly" the community problems. Primer on Ascertainment, op. cit., p. 686. The FCC said a licensee providing programming only for "one or two" community problems would face a prima facie question "as to how the proposal would serve the public interest." Ibid.

[46]WSNT, Inc., 27 F.C.C. 2d 933 (1971). The hearing was later cancelled after the licensee arrived at an agreement with the groups which had petitioned to deny the license renewal of the station.

[47]The last had been the Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964), which had focused on the fairness principle.

[48]Officially, The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Fairness Report, 48 F.C.C. 2d 1 (1974).

[49]Ibid., p. 7.

[50]Ibid., p. 10. The report is quoting from Democratic National Committee, op. cit., p. 222.

[51]Fairness Report, op. cit., p. 10.

[52]See ibid., p. 19. Although some of the specifications for a fairness allegation would be inappropriate for an allegation that a licensee had not fulfilled his coverage responsibility, the FCC has never indicated what should be included in a complaint that a station had not provided a reasonable amount of issue-oriented programming.

[53]The report did indicate, in a footnote, that a list of public issues

broadcast by a station "ordinarily" would feature community problems which had been identified by the station. Ibid., p. 10.

By 1974, the Commission did not seem to be distinguishing between the terms "public issues" and "controversial issues of public importance." E.g., The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Notice of Inquiry, 30 F.C.C. 2d 26, 27 (1971); Friends of the Earth, op. cit., pp. 750-751; Democratic National Committee, op. cit., pp. 221-227; F.C.C., 37th Annual Report, op. cit., p. 30.

[54]Fairness Report, op. cit., p. 10 (quoting the Report on Editorializing, op. cit., p. 1247).

[55]Ibid., p. 10.

[56]Ibid.

[57]Public Communications, Inc., 50 F.C.C. 2d 395, 400 (1974).

[58]Ibid., p. 399.

[59]Ibid.

[60]American Broadcasting Cos., Inc., 56 F.C.C. 2d 275, 283 (1975).

[61]The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C. 2d 691 (1976) (hereinafter referred to as Reconsideration).

[62]Ibid., pp. 694-695.

[63]Ibid., pp. 693, 695.

[64]Representative Patsy Mink, 59 F.C.C. 2d 987, 996 (1976).

[65]Ibid., p. 995.

[66]Approval of the station's renewal application was delayed, but that was the only action taken against the station.

[67]Council on Children, Media and Merchandizing, 40 P & F Radio Reg. 2d

1718 (1977); Horace P. Rowley, III, 40 P & F Radio Reg. 2d 181 (1977); Karl E. Smith, 40 P & F Radio Reg. 2d 266 (1977).

[68]Scripps-Howard Broadcasting Co., 42 P & F Radio Reg. 2d 851, 857 (1978).

[69]U.S., F.C.C., Initial Decision of Administrative Law Judge James K. Cullen Jr., United Broadcasting Company (1978), p. 24.

[70]U.S., F.C.C., Statement of FCC Chairman Charles D. Ferris, on S. 22, Dealing with the Fairness Doctrine, Political Broadcasting and Related Matters, Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (June 7, 1978), p. 8 (hereinafter referred to as Statement of Chairman Ferris).

[71]There was no evidence to the contrary in the United Broadcasting Co. case. Supra, note 69, and United Broadcasting Co., 59 F.C.C. 2d 1412, 1414-1415 (1976) (a Review Board opinion).

[72]This interpretation makes sense considering the role of this FCC agency--to adjudicate complaints as they arrive at the Commission. Such an approach is not very appropriate for a licensee responsibility to devote a reasonable percentage of air time to public issues in general. The Complaints and Compliance Division can deal legitimately only in terms of particular programs or particular issues, rather than overall programming behavior, which is the task of the Renewal and Transfer Division.

[73]The FCC relies on complaints from viewers and listeners to trigger fairness doctrine enforcement procedures. However, the coverage principle did not appear to be part of the fairness doctrine, as far as the FCC was concerned, until after the Red Lion opinion.

[74]The FCC very seldom has voted against a licensee for any failure to provide informational programming. Two exceptions, both cases where the Commission contended station performance did not match previous promises, were SJR Communications, Inc., (U.S., F.C.C., Summary Decision of

Administrative Law Judge David L. Kraushaar, 1978), and Rust Craft Broadcasting of New York, Inc., 54 F.C.C. 2d 1222 (1975). In both cases, the licensees were granted only one-year renewals, rather than the standard three-year renewals. Neither decision was based on a question of whether the licensee had provided a reasonable amount of time for the discussion of public issues.

[75]The FCC has no way of knowing how much "controversial issue" programming any station provides. A station's license application documents the amount of "public affairs" programming that has been offered during the last three years and the amount proposed for the next three. Licensees who proposed no "public affairs" programming at all have not been challenged by the Commission majority. E.g., Renewal of Standard Broadcast Station Licenses, op. cit., pp. 123, 125 and Herman C. Hall, 11 F.C.C. 2d 344, 345 (1968).

[76]F.C.C., Statement of Chairman Ferris, op. cit., p. 10. The FCC does exercise restraint in the handling of these complaints. FCC Chairman Ferris has said that only three per cent of the complaints even get to the licensee for comment, which means that in most cases the licensees are not even aware an allegation has been filed. Ferris said that only about 15-20 complaints a year are resolved in a manner unfavorable to the licensee. Ibid.

[77]See Chamberlin, "History of Public Issues Programming Regulation," op. cit., pp. 183-190 and Friendly, The Good Guys, The Bad Guys and the First Amendment, op. cit., generally.

[78]Public Communications, Inc., op. cit., p. 400.

[79]Licensees still have to provide programming to meet community standards, but the criteria applied in that evaluation are quite vague. See also supra, note 44.

[80]See Red Lion Broadcasting Co. v. FCC, op. cit., p. 396; Associated Press v. U.S., op. cit., p. 20; Columbia Broadcasting System, Inc. v. Democratic National Committee, op. cit., pp. 116-121. See also Alexander Meiklejohn,

Free Speech and Its Relation to Self-Government (Port Washington, N.Y.: Kennikat Press, 1972), pp. 16-27, 88 and William Hocking, Freedom of the Press: A Framework of Principle (New York: Da Capo Press, 1972), pp. 98-99, 123, 131.

[81]Before the FCC had criticized WHAR of Clarksburg, W.Va., for failing to carry programming about strip-mining, it had said that licensees should carry programming on issues "critically" important to their communities in only two documents. One was a well-publicized opinion which attracted attention for reasons other than the language at issue. The other document was a major FCC policy report but the appropriate language was contained in one paragraph on page 10 of a 48-page statement. Neither document suggested the FCC would enforce the principle any more than any other programming policy. See supra, notes 73 and 74. The only reason WHAR attracted attention was that it naively defied the principle in a letter to Rep. Patsy Mink, who showed the statement to a public interest law firm. The licensee's letter was dated July 23, 1974. Representative Patsy Mink, op. cit., p. 987. The major FCC document referred to above was printed in the Federal Register five days before.

[82]One of the three bills currently being considered would eliminate the entire fairness doctrine (except for the personal attack rule), including the coverage principle, for both radio and television. That bill is S. 622, sponsored by Senators Barry Goldwater, Harrison Schmitt and Larry Pressler. A second bill, H.R. 3333, would eliminate the entire fairness doctrine, including the coverage principle, for radio. However, H.R. 3333, sponsored by Representatives Lionel Van Deerlin, James Collins and James Broyhill, would preserve both aspects of the fairness doctrine for television. S. 611, sponsored by Senators Ernest F. Hollings, Howard Cannon and Ted Stevens, would preserve the entire fairness doctrine for both radio and television.

An alternate approach was suggested in H.R. 13015, the first attempted rewrite by Van Deerlin, submitted for consideration more than a year ago. Van Deerlin suggested for television (the fairness doctrine would have been eliminated for radio) eliminating the fairness doctrine as it is now known and substituting what he called the equity principle. The approach would have probably eliminated the coverage principle, but confusion arose over the effect the proposal would have on fairness principle precedents. See U.S., House of Representatives, Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, H.R. 3333, "The Communications Act of 1979" Section-By-Section Analysis, 96th Cong., 1st Sess., 1979, p. 48. Instead of the coverage principle (and programming requirements linked to ascertainment), H.R. 13015 proposed that the regulatory commission should be mandated to require of television licensees only that they provide "news, public affairs, and locally produced programming (including news and public affairs) throughout the broadcast day." The latter proposal was preserved in H.R. 3333, submitted this year, even though the coverage principle was reinstated.